No. 12276

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARMON M. WALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant's motion to vacate, and set aside sentence, pursuant to New Title 28, U. S. Code, Sec. 2255, on the grounds that Count One of the indictment in cause No. 14,852, records of the U. S. District Court, Western District of Washington, South-

ern Division, did not allege that George Weyerhaeuser was a kidnapped person within the meaning of the statute at the time he was alleged to have been transported in interstate commerce by the defendants (including appellant), and therefore, the court was without jurisdiction to issue sentence, was filed in the said trial court and cause on February 21, 1949 (R. 7-9).

On April 18, 1949, the District Court, on its own motion, denied appellant's motion. (R. 10-11). From that final order, this appeal is taken. (R. 12-17).

The facts material to a determination of appellant's right to vacation of said judgment and sentence, as disclosed in the record, may be summarized as follows:

On June 19, 1935, an indictment containing two counts was returned against appellant and others in the Southern Division of the United States District Court for the Western District of Washington, which indictment in Count One charged the defendants, appellant here and others, with violation of the "Lindbergh Act". (Title 18 U.S.C.A. Section 408a), in that the defendants on or about May 27, 1935, did knowingly transport a person, George Weyerhaeuser, in interstate commerce from Tacoma, Washington, to Blanchard and Spirit Lake, State of Idaho,

who had therefore on or about May 24, 1935 been unlawfully seized, kidnapped, carried away, and held for ransom and reward by said defendants, and that said defendants failed to release said George Weyerhaeuser within seven (7) days after he had been so unlawfully seized, kidnapped, and carried away. (R. 1-4).

Thereafter, on June 21, 1935, the appellant, upon his conviction, was sentenced to 45 years on Count I and 2 years on Count II, sentences to run concurrently. Count II was the conspiracy count, and is in no way involved in these proceedings. (R. 5-6).

QUESTIONS PRESENTED

I.

Does Count One of the indictment fail to charge a federal offense?

II.

What are the legal requirements in this proceeding?

(a) As to mover's right to assistance of counsel; and

(b) As to duty of court to make findings of fact and conclusions of law.

ARGUMENT AND AUTHORITIES

1. Count One of the Indictment Sufficiently Charges an Offense Under the Law.

The statute involved in the original proceedings is Title 18, U.S.C.A. Sec. 408a commonly known as the "Lindbergh Act", which reads as follows:

> "*Kidnaped Persons; transportation, etc., of persons unlawfully detained.*
>
> Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: Provided, that the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive (June 22, 1932, C. 271, Sec. 1, 47 Stat. 326, as amended May 18, 1934, C. 301, 48 Stat. 781)".

Count One of the Indictment charged:

> "*That * * * Harmon Metz Waley * * * and * * * who are hereinafter referred to as defendants*, on or about the twenty-seventh day of May,

* * * (A.D. 1935), at Tacoma, in the Southern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district then and there being, did then and there wilfully, unlawfully, knowingly and feloniously transport and cause to be transported, and aid and abet in transporting in interstate commerce a person, to-wit, George Weyerhaeuser, who had been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away without lawful authority and against his will and without his consent, and held for ransom and reward, that is to say, that *on or about the twenty-seventh of May, * * * (A.D. 1935), at Tacoma, in the said Southern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district, the said defendants, and each of them then and there being, did wilfully, unlawfully, knowingly, and feloniously transport and cause to be transported, and aid and abet in transporting by means of motor vehicle in interstate commerce from Tacoma, aforesaid, to Blanchard and Spirit Lake, State of Idaho, one George Weyerhaeuser of Tacoma, District and Division aforesaid, who had theretofore, to-wit, on or about the twenty-fourth day of May, * * * (A.D. 1935), been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away, without lawful authority, and against his will and without his consent, and held for ransom and reward by said defendants, and that said defendants failed to release said George Weyerhaeuser within seven (7) days after he had been so unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away, as aforesaid, all of which the said defendants then and there well knew; contrary to the form of the statute in such case made and provided,*

and against the peace and dignity of the United States of America. (Italics ours)

Appellant, while conceding jurisdiction of the trial court over the person and the subject matter, as it decided in its order herein, does not concede that it follows that such jurisdiction gives to the court jurisdiction to decide contrary to law or issue a sentence thereupon. (Appellant's Brief — page 4).

It is the contention of appellant in his assignments of error "B" and "C" (R. 13-14), and as set forth in his brief, at pages 5 and 6, that the statute contemplates a simultaneous seizure and transportation, that is, a seizure occurring several days before the date of transportation is not included in the language of the statute. The acts, he contends, should coincide and the seizure with reference to the time of transportation should be eo instante.

In his motion to vacate (R. 8-9), however, appellant does not find fault with the prior date of seizure, but with the allegations of the indictment in that it appears to him that at the later date or when George Weyerhaeuser was supposed to have been transported in interstate commerce, it does not allege that he was so unlawfully, etc. held or kidnapped, or while so held that he was transported in interstate commerce.

In the manner of pleading we believe that ap-

pellant has a point. But this indictment makes up in quantity of words what it lacks in quality of expression. It alleges the date of seizure on or about May 24, by the defendants, and that they failed to release him within seven days after he had been so unlawfully seized, and it also alleges that he was transported, on or about May 27th, or during that period of seven days while they failed to release him after he had been so unlawfully seized. And certainly the expression "failed to release" should confirm the fact that he was then being "held".

It should not be overlooked, however, that it is well settled that defects in an indictment, not going to the jurisdiction of the court which pronounced sentence, may not be raised on habeas corpus. This, we contend, applies equally to the instant proceeding by way of motion.

SEE

Knight v. Hudspeth, 112 F. (2d) 137;

United States v. Dressler, 112 F. (2d) 972;

NcNally v. Hill, 69 F. (2d) 38, aff'd 293 U. S. 131;

Creech v. Hudspeth, 112 F. (2d) 603;

Huntley v. Schilder, 125 F. (2d) 250.

II. *What Are the Legal Requirements In This Proceeding?*

(a) As to Mover's Right to Assistance of Counsel.

Appellant contends that such motion is a part of the original proceedings wherein he was entitled to the Constitutional right in a criminal prosecution to have the assistance of counsel for his defense. (Appellant's Brief — page 3 — Assignment of Error A) (R. 13).

It is the contention of appellee that the motion herein provided raises the same question as would be raised by a Petition for Writ of Habeas Corpus and this proceeding is not a "criminal prosecution" as contemplated by Amendment VI to the Constitution of the United States, entitling the defendant to have assistance of counsel. *Brown v. Johnston*, 91 F. (2d) 370, cert. denied 302 U.S. 728. And the failure to have counsel after sentence is not in violation of this amendment. *Lovvorn v. Johnston*, 118 F. (2d) 704, cert. denied, 314 U.S. 607. Nor does the statute make any provision for assistance of counsel, but it does provide:

> "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." New Title 28, U. S. Code, Sec. 2255.

The foregoing provision would not imply that a criminal prosecution was involved.

The defendant, it must be contended, has had his day in court and is not now entitled to a second trial with all the rights and privileges accorded to an accused by this amendment, including the right to have the assistance of counsel for his defense in all criminal prosecutions.

In Paragraph IV of appellant's brief, pages 7 and 8 with reference to Assignment of Error D (R. 14) appellant himself brings his motion or petition within the realm of civil proceedings in contending allegations not denied must be accepted as true.

Appellee fails to find any allegations of fact in appellant's motion and does not feel bound by the undenied legal conclusions, and contentions set forth therein See *Quagon v. Biddle*, 5 F. (2d) 608.

(b) As to Duty of Court to Make Findings of Fact and Conclusions of Law.

In answer to Assignment of Error E (R. 14), it would not appear incumbent on the court denying a motion as herein to make any finding as to jurisdiction, and if it failed to so do, then, it would not follow that a valid judgment would thereby become void, as contended by appellant.

However, a reading of the court's order will dispel the foregoing illusion indulged by appellant. Under the statute, only in the case of a hearing is it required that the court determine the issues and make findings of fact and conclusions of law with respect thereto.

Upon the issue raised by appellant's last assignment, the opinion of the United States Court of Appeals for the Ninth Circuit in *Waley v. Johnston*, 139 F. (2d) 117, 121, as contained in the last paragraph, seems applicable, wherein it is announced:

> "The indictment stated facts giving the trial court jurisdiction. Appellant pleaded guilty in open court in the presence of his attorney, thus conceding the facts alleged. The only question on this habeas corpus proceeding is whether the plea of guilty was freely and voluntarily entered. The court finds it was. There is ample evidence to sustain that finding."

CONCLUSION

For the foregoing reasons, we contend the decision below should be affirmed.

Respectfully submitted,

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GUY A. B. DOVELL,
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